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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

In re D.W., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

D.W.,

Defendant and Appellant.

A146790

(Contra Costa County
Super. Ct. No. J15-01018)

Minor appeals from a dispositional order issued pursuant to Welfare and Institutions Code section 602 after the court found that he had committed an attempted robbery. He contends the court unconstitutionally imposed a condition of probation that requires him to permit searches of, and disclose the access code to, his cell phone. We conclude that the challenged probation condition is reasonably necessary to ensure minor's compliance with the probation condition that forbids him from communicating with specified individuals, but must be modified to eliminate possible overbreadth and vagueness. As modified, the order of probation will be affirmed.

Factual and Procedural Background

On August 24, 2015, a juvenile wardship petition was filed alleging one count of attempted second degree robbery (Pen. Code, §§ 211, 664) and two counts of child endangerment (§ 273a, subd. (a)). At a contested jurisdictional hearing, evidence was presented that on the evening of August 22, 2015, the victim was at a park with his

seven-year-old daughter and nine-year-old son when he encountered minor and his accomplice. The victim became uncomfortable and left the park with his children after the minor asked the victim for directions and the accomplice asked the victim for a ride. About two blocks from the playground, the minor and his accomplice approached the victim again, this time asking for 50 cents and directions to a bus. The victim was scared and gave defendant four quarters. Minor and his accomplice began to follow the victim and his children and as the victim turned to look behind, the accomplice hit the victim in the face. The victim, who was holding his daughter, fell to the ground. The minor demanded the victim give him money. The victim grabbed a piece of wood and chased minor and his accomplice away. The victim reported the incident to the police and the police apprehended the minor and his accomplice shortly thereafter. The victim identified minor and his accomplice in a “cold show.”

The court sustained allegations of felony attempted second degree robbery, but found the child endangerment allegations not true.

On November 2, 2015, the court adjudged defendant a ward and committed him to Orin Allen Youth Rehabilitation Facility for a six-month program, plus an additional 90-day conditional release parole period. The court imposed numerous probation conditions, including school attendance and counseling requirements, residence restrictions, a curfew, prohibitions against the possession of dangerous or deadly weapons, alcohol, or drugs, submission to drug/alcohol testing, and reporting police contacts within 24 hours. The court also prohibited minor from contacting by electronics or otherwise either his accomplice or the victim’s family and required minor to stay 100 yards away from the victim’s home.

The probation department also requested imposition of a condition requiring minor to “submit . . . any cell phone or any other electronic device in his possession [and] access code . . . to search and seizure by any peace officer at any time of the day or night, with or without a warrant.” Defense counsel objected to the requested condition on the ground that minor had not used a cell phone to facilitate the offense. The prosecutor argued that electronic searches were needed to supervise minor, noting particularly the

condition that prohibits electronic contact with the victim's family or with the accomplice. The trial court struck the language authorizing a search of "any other electronic device" in minor's possession but required the minor to submit his "cell phone and access code" to search and seizure by a peace officer without a warrant.

Minor filed a timely notice of appeal.

Discussion

Minor contends the probation condition authorizing the warrantless search of his cell phone is invalid under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) and unconstitutional. The parties cite the numerous appellate decisions in which the appellate courts have recently addressed this issue, including some currently pending review before the California Supreme Court (see e.g. *In re Ricardo P.*, review granted Feb. 17, 2016, S230923; *In re Patrick F.*, review granted Feb. 17, 2016, S231428; *In re Alejandro R.*, review granted March 9, 2016, S232240; *In re J.R.*, review granted March 16, 2016, S232287; *In re Mark C.*, review granted April 13, 2016, S232849; *In re A.S.*, review granted May 25, 2016, S233932; *In re J.E.*, review granted Oct. 12, 2016, S236628).

In *In re J.B.* (2015) 242 Cal.App.4th 749 (*J.B.*), this court observed that the juvenile court's discretion to select appropriate conditions of probation while broad, is not unlimited. The court's discretion is constrained by the *Lent* test which renders a condition of probation invalid if it: " " "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." ' ' ' ' (*Id.* at p. 754.)

In *In re Erica R.* (2015) 240 Cal.App.4th 907 (*Erica R.*), the court rejected the argument that the electronic search condition is reasonably related to future criminality in that it was designed to help probation officers monitor other probation conditions prohibiting drinking alcohol or taking drugs. (*Id.* at p. 913.) The court observed, "the record does not support a conclusion that the electronic search condition is reasonably related to future criminal activity by Erica. The juvenile court justified the electronic search condition solely by reference to its experience that 'many juveniles, many minors,

who are involved in drugs tend to post information about themselves and drug usage.’ However, ‘[n]ot every probation condition bearing a remote, attenuated, tangential, or diaphanous connection to future criminal conduct can be considered reasonable.’ [Citation.] There is nothing in this record regarding either the current offense or Erica’s social history that connects her use of electronic devices or social media to illegal drugs. In fact, the record is wholly silent about Erica’s usage of electronic devices or social media. Accordingly, ‘[b]ecause there is nothing in [Erica’s] past or current offenses or [her] personal history that demonstrates a predisposition’ to utilize electronic devices or social media in connection with criminal activity, ‘there is no reason to believe the current restriction will serve the rehabilitative function of precluding [Erica] from any future criminal acts.’ ” (*Ibid.*) The court in *Erica R.* also pointed out the difference between adult and juvenile probation explaining, “ ‘ “[J]uvenile probation is not, as with an adult, an act of leniency in lieu of statutory punishment; it is an ingredient of a final order for the minor’s reformation and rehabilitation.” ’ [Citation.] A juvenile ‘cannot refuse probation [citations] and therefore is in no position to refuse a particular condition of probation.’ [Citation.] Courts have recognized that a ‘minor cannot be made subject to an automatic search condition; instead, such condition must be tailored to fit the circumstances of the case and the minor.’ ” (*Id.* at p. 914.)

In *J.B.*, we adopted this reasoning in finding that an electronic search condition was unreasonable where there was no evidence that the minor used e-mail, texting or social networking Web sites to facilitate his offense and there was no showing of any connection between the minor’s use of electronic devices and his past or potential future criminal activity. (*J.B.*, *supra*, 242 Cal.App.4th at pp. 754, 756.)

Since issuing our decision in *J.B.*, , *In re P.O.* (2016) 246 Cal.App.4th 288, 295, has been decided, in which the court concluded that insofar as an electronic search condition “enables peace officers to review P.O.’s electronic activity for indications that P.O. has drugs or is otherwise engaged in activity in violation of his probation,” it is reasonably related to deterring future criminal activity as required by the *Lent* test. The court also concluded, however, that the electronics search condition was

unconstitutionally “overbroad in its authorization of searches of cell phones and electronic accounts accessible through such devices because it is not narrowly tailored to its purpose of furthering his rehabilitation. According to the juvenile court, the condition's purpose is to allow monitoring of P.O.’s involvement with drugs, but the condition does not limit the types of data that may be searched in light of this purpose. Instead, it permits review of all sorts of private information that is highly unlikely to shed any light on whether P.O. is complying with the other conditions of his probation, drug-related or otherwise.” (*Id.* at p. 298.) Accordingly, the court ordered the condition “modified to limit authorization of warrantless searches of P.O.’s cell phone data and electronic accounts to media of communication reasonably likely to reveal whether he is boasting about drug use or otherwise involved with drugs. In addition, while P.O. must disclose to peace officers passwords necessary to gain access to these accounts, to the extent any other types of digital accounts maintained by him are password protected, he is not required to disclose those passwords.” (*Ibid.*)

Here, there is no dispute that minor did not use a cell phone in any way in connection with the offense and no evidence that minor regularly used a cell phone to contact his accomplice. Indeed, the probation report does not even mention whether minor has a cell phone. With regard to minor’s social history, the probation department reported that minor had reconnected with his father about a year prior and that while spending the summer at his father’s house, he began associating with peers who were a negative influence on him. His mother reports that he performed poorly in school during this time and, as a result, he is close to a semester behind in school. The report also notes, however, that his overall performance in school since being placed in juvenile hall has been “very good” and he was recently awarded “student of the week.” According to records from his prior high school, minor has never had any significant attendance or behavioral problems at school. With respect to drugs and alcohol the report states: “The minor says that he tried marijuana one time when he was in the 8th grade but didn’t like it. He therefore has not used it again, he asserts, or tried any other illicit intoxicating substances, including alcohol.” The probation report ultimately concludes that “this may

be a case of an otherwise well-adjusted young teen making a very bad decision, a usually responsible adolescent who acted without fully considering the possible negative consequences of his conduct.” Given these facts, it is clear that the condition has no connection to his past criminality. .

Until the Supreme Court finally resolves the issue, we adhere to the views we expressed in *In re J.B. supra*. However, unlike the situation in *Erica R.*, and in *J.B.*,¹ here the minor has also been prohibited from contacting by electronics or otherwise his accomplice and the victim’s family. Given that restriction, which is itself reasonable and in accord with *Lent*, it is also reasonable to permit a limited search of his cell phone to ensure compliance with that restriction. To avoid any possible unconstitutional overbreadth, the search condition must be closely tailored to its purpose. (*In re P.O., supra*, 246 Cal.App.4th at p. 297.) Accordingly, the electronic search condition must be modified to authorize only searches of minor’s text messages, e-mail, telephone call history, voice mail, or other communication programs like FaceTime or Skype, and social media accounts. The search condition will not permit access to other accounts or data stored or accessed by minor on his cell phone.²

Disposition

The condition of probation that requires minor to submit his cell phone with access codes to warrantless search by a peace officer shall be modified to read: “Submit any cell phone under his control to a search by a peace officer of any text messages, email, telephone call history, voice mail, or other communication programs like FaceTime or Skype, and social media accounts, with or without probable cause, and

¹ In *J.B.* the minor had been ordered to stay away from a co-participant in his offense, but the order did not encompass electronic communications or contacts with the victim or the victim’s family, and in all events was not the focus of consideration.

² We retain our reservations as to the efficacy of these limitations (see *In re J.B., supra*, 242 Cal.App.4th at pp. 758-759), but cannot better define the permissible scope of a cell phone search while prohibiting excessively broad searches that go beyond what is reasonably necessary to monitor the terms of probation.

provide the peace officer with any passwords necessary to access the information specified.”

As so modified, the order of probation is affirmed.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.